(3)

95-1747

Supreme Court, U.S.
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CLERK

No._____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1996

In Re DENNIS M. O'CONNOR, M.D.,
RICHARD FRIDAY, *Petitioners*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA.
HONORABLE MARILYN HALL
PATEL, JUDGE, *Respondent*

MAGNO J. ORTEGA, M.D.,
Real Party in Interest

Petition from Orders and Judgment of the United States District Court for the Northern District of California, Honorable Marilyn Hall Patel, Judge Presiding

BRIEF AND DECLARATION IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

by MAGNO J. ORTEGA, M.D.,
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20 pp

QUESTIONS CONTESTED / PRESENTED IN PETITION

1. Whether the Honorable Patel, District Court Judge. disobeyed the prior mandate of this Court in O"Connor v. Ortega, 480 US 709 (1987) by denying petitioners' summary judgment motion, directing a verdict against petitioners on liability (for seizing personal correspondence), and stripping petitioners of their (subjective) qualified immunity defense.

2. Whether this Court should exercise its supervisory jurisdiction to issue a writ of mandamus and/or prohibition vacating the respondent district court's orders, and compelling it to enter judgment in petitioners' favor, as was done in the first trial (seven years) following Court's remand (in a directed vardict that, after only the interested parties listed in petition were wrongly allowed to testify, was immediately reversed).

LIST OF PARTIES

Petitioners: Dennis Michael O'Connor, M.D.
and Richard Friday

Respondent: United States District Court for
the Northern District of California,
Honorable Marilyn Hall Patel, Judge

Real Party in Interest: Magno J. Ortega, M.D.
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In Re DENNIS M. O'CONNOR. M.D.
and RICHARD FRIDAY, *Petitioners*

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
HONORABLE MARILYN HALL PATEL, Respondent

MAGNO J. ORTEGA, M.D., Real Party in Interest

Petition from Orders and Judgment of the United States
District Court for the Northern District of California,
Honorable Marilyn Hall Patel, Presiding

BRIEF AND DECLARATION IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

PRAYER

Real Party in Interest prays for the Court to dismiss this petition. Honorable Judge Patel had not disobeyed the Court.

OPINIONS BELOW (as submitted in petition)
JURISDICTIONAL GROUNDS and
CONSTITUTIONAL and STATUTORY
PROVISIONS (as stated in petition)

FURTHER STATEMENT OF THE CASE, FIRST JURY TRIAL

Though *Harlow v. Fitzgerald*, 457 US 800 (1982) was not yet established law at the time O'Connor ordered the search, it was already available when O'Connor v. Ortega was argued in the Supreme Court, and had been used by Ortega (then the named respondent) to re-establish liability by O'Connor, *et al*.

Reflecting already established practice, *Harlow* held that whether an official protected by qualified immunity may be held personally responsible for an allegedly unlawful official action generally turns on the **objective** "legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time the action was taken.

Following remand as stated in petition, and numerous delays, the first jury trial was indefinitely postponed by phone late in the day just before it was scheduled to start, and after all witnesses had obtained time off from work. Held years later, it was adjourned with a directed verdict after no one but the petitioners (Dr. O'Connor and Mr. Friday) and Dr. Ortega have been allowed to testify. That verdict was reversed as was the first summary judgment by the same judge. He had died by then and the case was remanded for jury trial to another judge.

The sole justification testified to by Mr. Friday for the search, before a directed verdict was issued in the first jury trial, was simply to save the state $1,800 worth of allocated

and approved but unspent computer consultant funds for graduating residents in their fourth year of training.

The contract for it had been withheld. It surfaced belatedly during a poorly conducted cross-examination of Ortega by deputy attorney general and state counsel Rubin before Ortega could call on any witness or himself to testify on his behalf.

(Mr. Rubin was not adequately prepared nor expecting to proceed and had just rested his case for the state when the hearing officer instructed him to cross-examine Ortega, in order indubitably to dispose of the case with a "preponderance of evidence" as soon as possible.

(When a witness. -- the Chief Resident in Dr. O'Connor's graduating class who was Dr. Onne then and Dr. Sutton at the hearing in 1981, -- testified to how contractors meet their obligations over the years, she was asked why she sent Ortega, ten years before that 1981 hearing, what has now been decided as "illegally seized" self-made Valentine card, standard book of love poems, and her half-clad photograph as a model.

(Before the hearings even started, the hearing officer had told the early arrivals that "We have everything we need here, this should not take long."

(The hearings spread over five months and ended with another instruction for Ortega to submit his testimony in writing and not have it heard in a public hearing! He was not cross-examined again, which makes all that he submitted undisputed or unread. Yet he was dismissed and disqualified from state employment forever: "One strike and you're out!")

THE SECOND JURY TRIAL

This petition, in praying for a new trial, restricts its focus to the lawyers and judge. The second jury trial was a battle between witnesses and the jury was the judge. The behavior of the lawyers as they examine and cross-examine each witness was also observed. (Frequently, objections by defendant's counsel seemed to be followed, after a short but pregnant pause, by a well articulated but probably rehearsed response from his witnesses, including present petitioners.)

Nowhere in the petition is it mentioned how long the jury of eight, by agreement from both parties in dispute, deliberated after each phase ended. For the liability phase, the jury was out 6 hours. For the damage phase, the jury was out more than 6 hours. Throughout the trial they were alert and attentive, and by themselves conscientiously reviewed every piece of evidence and asked questions that came to them while doing it. Their verdict was arrived at from sum total of facts.

In this battle of witnesses, defendants' counsel withdrew a whole series that he had listed with offers of proof. Mr. Arnold -- (accountant student intern whom Mr. Friday appointed to look into contracts, but had not been a signatory to either of the two investigative reports when they were submitted "in camera" to Judge Vukasin) -- did not testify. Of alumni and still-to-graduate residents in 1981 that were listed by defendants, only Dr. Gandhi (who was Chief Resident in 1981) and petitioner O'Connor testified, but not Dr. Thomas Jackson, Dr. Robert Farmer, nor Dr. Elizabeth

Reynolds (whom counsel for defendants promised will be called).

Dr. Asha Gandhi's diary showed that, in the presence of Mr. Friday, on the Friday the secretaries told her Ortega had left to go "on vacation", Ortega's office door lock had been changed during the previous night. But there was obviously no need to do it at night, since each door key had a duplicate for the cleaning crew who worked at night. Mr. Friday did not deny being there early that Friday.

(The only reason for a locksmith to come is to open an old desk that Dr. Ortega locks every night for the last 17 years.

(Thusly did another undiscovered document became highly suspect. It stressed changing the lock to Ortega's office before he was asked to leave the premises and stay off the grounds!)

Dr. Elizabeth Reynolds worked with another alumna, Dr. Pranger (below) with the same group of residents since their graduation, and had also supervised Dr. Laskay, one of the investigators. She was the very first witness called during the State Personnel Board (hereafter S.P.B.) hearing in 1981.

When Ortega barely registered an objection against her "stale complaint", Mr. Rubin, then deputy attorney general, started to suspect that what she had to say might destroy their whole case without tainting Ortega's unblemished reputation.

[He had wanted a scandal to start the hearing -- (he succeeded later on, after failing to blackmail Ortega with Dr. Onne's photograph into not having Dr. Sutton testify!) -- by establishing an extended pattern of sexual harassment.]

He was right about why Ortega did not strenuously object: Dr. Reynolds was Ortega's co-leader in teaching family therapy to residents that year. Unsure by now, Rubin used all he had that another female resident (Chief Resident Onne, *nee* Sutton) sent to Ortega long ago to "open in secret", to show that she may be biased, when the Valentine card alone would have allowed the biased S. P. B. hearing officer to dismiss her testimony and tilt the weight of evidence against Ortega. (He said he agonized about Mrs. Ortega finding out through him!)

But a mistrial was sought when Dr. O'Connor's own record was used to cast doubt on his past professional honesty before the very same jury (which had no hidden agenda):

Dr. O'Connor had received a public letter of reprimand from the state medical licensing board after having illegally self-prescribed a restricted drug for a non-existent patient of his own age that he had invented!

And then, during closing argument, when plaintiff's counsel raises an objection, defendant's counsel would make faces to the jury. The judge was asked to remind him that he cannot silently comment that way, without it being recorded.

(By that time he had lost what little credibility he had left, since, unbeknownst to himself, he also addressed the jury with his arms clasped tightly across his chest, as if unable to be open and forthcoming with his audience. This was in stark contrast to plaintiff's counsel's demeanor.)

Only once did plaintiff's counsel rebut with some passion, when he pointed out that, in defendant's counsel's closing argument, he was still unwilling to see how defendants, now petitioners, exceeded their authority over an extended period.

(Should they be made accountable and separately become examples to be disavowed in the conduct of public office?)

It may well be this shared unwillingness by petitioners and their counsel to accept the exercise of excessive zeal by the state in searching and seizing, for self-serving reasons, that helped the jury to assess and award separate punitive damages.

(Good faith is always asserted and bad faith denied There was no self-defeating rebuttal offered to report of traffic court canceling all 60 parking tickets issued to Ortega by Friday's security officers for months before the search and seizure, when Ortega parked where he had always parked for 17 years, even on Sundays when he came on hospital grounds!)

REASONS FOR DISMISSING THIS PETITION

Petitioners' pleas for writ of mandamus and/or prohibition rest on grounds that (1) punitive damages would be chilling to unschooled administrators, that (2) they were deprived of a subjective "qualified immunity" defense, and that (3) their asserted (new and inventive) version of sexual harassment was not accepted as reasonable justification for search and seizure.

Each of their allegations to explain their defeat is discussed separately below as if not already lacking in inherent merit.

(1) THE "CHILL FACTOR" PREDICTED BY PETITIONERS IS ALREADY FELT BY "REAL PARTY IN INTEREST".

What is truly chilling is the effect this petition has on its target, the real party in interest who does not have the

unlimited resources of the state for legally harassing those who contest their abuse of authority under color of office.

All because of the hidden bias of the plurality against state employees "whose position members of the plurality do not look upon with much sympathy" (107 SCt 1506, continued below), all the while, ostensibly, making it easier for their employers not to consult state lawyers for case-by-case advice before undertaking intrusions into the private lives of workers:

The state paid up to $335,000 for trying to silence public criticisms by O'Connor's fellow alumnus from Dr. Ortega's post-graduate residency training program who worked as a staff psychiatrist and, also on O"Connor's watch, about $250,000 settled a case of negligent homicide by a prematurely discharged patient of a policeman whose survivors sued.

In contrast to petitioners, Ortega's record of 17 years was without a single grievance against him while he trained doctors -- (who then passed certification by the American Board of Psychiatry at higher rate than the national average) -- to staff understaffed state hospitals and prisons (some came to testify).

"The manner in which the plurality arrives at its standard, it seems to me, thus not only harms Dr. Ortega and other public employees, but also does a disservice to Fourth Amendment analysis." (Justice Blackmun, *O'Connor v. Ortega*, 107 SCt 1506).

"Where the warrant requirement might be 'unwieldy ' for public employers if it was required for every workplace search, the plurality has failed to explain why, on the facts of

this case, obtaining a warrant was burdensome for petitioners, evem if one assumes that they were unfamiliar with this requirement. In fact, the opposite seems true. Moreover, contrary to the plurality's suggestion, see *ante* at 1500, the warrant requirement is not limited to the criminal context." (Mr. Friday had search and seizure lessons. and search for forged documents has now been judicially noticed). At 1512.

"It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections (see *ante*, at 1507) inevitably surface . . . and shape, more than they ever should . . . any legal standard that is then articulated."

Justice Brennan, in *New Jersey v. T.L.O*, 469 US 325, 366-7 (1985) held that **"The only true rules governing search and seizure have been formulated and refined in the painstaking scrutiny of case-by-case adjudication."** (Thus, a single standard does not more efficiently serve justice for the individual nor does it increase the effectiveness of the collective.)

(2) PETITIONERS' COMPLAINT OF DENIAL OF SUBJECTIVE QUALIFIED IMMUNITY IS LODGED WITH THE WRONG COURT.

Pleas for extraordinary writ because the Ninth Circuit does not readily grant "qualified immunity" is premature. Petitioners did not pursue the issue of "qualified immunity" in petitioning for writ of certiorari in 1985.

They cannot now plead it and obtain special consideration even before the Ninth Circuit rules on whether they have been unlawfully deprived of such a defense.

"The qualified immunity issue was not raised below and was not addressed either by the District Court or the Court of Appeals." 107 SCt 1503. [Is it any court's duty to rescue preceding counsel who may be (as is now) accused of negligence (in not using both qualified immunity and sexual harassment in their prayers after losing in the court below)?]

"An extraordinary writ (under Sec. 1651 of Title 28 of U.S. Code) is a drastic remedy that must not be used to regulate the trial court's judgment in matters properly left to its sound discretion (of which more later), but that may be available to confine (of which even more later) the trial court to sphere of its discretionary power." . . .

"(It) **may** (emphasis added) be appropriate to prevent a trial court from making a discretionary decision where a statute (not case law) effectively removes the decision from the realm of discretion." In *re Estelle*, CA 5 (Tex.) 1975, 516 F2d 480, rehearing denied 521 F2d 814, certiorari denied 96 SCt 192.

Petitioners have prejudged their chances not least because their understanding of the cases they cited in their petition, to support a qualified immunity defense, is poor and/or deficient:

The Ninth Circuit *(sic)* decided in *Scott v. Henrich*, 39 F3d 912 (1994) that "Police were entitled to assert defense of qualified immunity from liability for civil damages arising from their use of deadly force without proving that they availed themselves of least intrusive means of responding to exigent situation; it was clearly not unreasonable for officers to take arms, knock on door of apartment, and identify themselves as police based on report of armed man inside

who recently fired shots and was acting crazy." Was Ortega crazy?

In *Sloan v. Herman*, 983 F2d 107 (8th Cir. 1993), "(Prison) (o)fficial's good faith or bad faith is irrelevant to qualified immunity inquiry; standard is one of **objective** reasonableness" (emphasis added).

This case law even emasculates preliminary requirement in *Harlow* (see above) that "Qualified or 'good faith' immunity is affirmative defense that must be pleaded by defendant official."

To defendants from police or prisons, FBI or Secret Service, as in *Hunter v. Bryant*, 502 US 224 (1991), "(q)ualified immunity standard gives ample room for mistaken judgments (on the spot, so to speak) by protecting all but the plainly incompetent or those who knowingly violate the law."

In *Anderson v. Creighton*, 107 SCt 3034 (1987), also established as law after warrantless search of Ortega's office in 1981 but cited in petition, the FBI were looking for a fugitive!

In more comparable *Sloan* (above) "Counsel's advice that court order to release inmate was not lawful did not immunize prison officials from liability for disobeying that order once order became final and nonappealable."

Petitioners for extraordinary writ allege that state counsel was consulted before separating state from private property. An investigator, Dr. Laskay, testified that after O'Connor forgot signing some letters, they searched for forged papers.

(Had they found any, Ortega would automatically lose all that the state had contributed to his retirement income to date!)

There was no testimony that legal counsel was consulted about whether what has now been **judicially noticed** as warrantless **search for forged documents** by Dr. Laskay was reasonable. Furthermore, Mr. Friday testified that, as head of security, he had had courses on "search and seizure"

From the Ninth Circuit again, in *Lucero v. Hart*, 915 F2d 1367 (1990) "County officials (who were granted qualified immunity) made reasonable efforts to accommodate clerk typist (who was) given numerous opportunities to re-take typing test (and) did not respond to attempts to provide her with alternative employment that did not involve typing."

Shields v. Burge, 874 F2d 1201 (7th Cir. 1989) held that: "It was not unreasonable . . . to think that search would turn up . . . evidence that would link the officer to alleged misconduct, . . . such as phone messages, calendar entries, memoranda or information concerning investigation of the target."

Petitioners allege no such aims to justify their intrusions, and no evidence whatsoever was produced that would support the reasonableness of the inception or scope of the search or seizure. They did not look for or find sexual paraphernalia.

Even federal employers like the Attorney General in 1986, when asked about searching and seizing of offices and papers of public employees to investigate diversion of federal funds to the Contras of Central America, was "not sure we would have any opportunity or any legal right to get into those

personal papers . . . I don't think public employees' private documents belong to the Government." (480 U.S. 737)

" . . . the seizure of a Valentine card, a photograph and a book of poetry . . . could have no conceivable relation to the claimed purpose of the search. . . this seizure is relevant to determining the reasonableness of the scope of the search. Accordingly, under the plurality's own standard, the search was unreasonable." Justice Blackmun in 1985, (107 SCt 1513).

(3) SEXUAL HARASSMENT COMPLAINT DID NOT START SEIZURE NOR JUSTIFY SCOPE OF SEIZURE AND *(sic)* / OR SEARCH.

Chief Resident's diary of the investigation shows that Ortega's office lock was changed in July 1981. This is also confirmed by defendant's counsel's own knowledge and admission in a pre-trial conference on March 26, 1996:

"Well, the lock was changed right from the get-go, at the end of July." (Cf. Appendix to this Petition, p. 78). Ortega's office as well as desk was allegedly searched afterwards.

In *Anderson* (above), the police already had "secure control" . . . i.e., the "greater intrusion" already had been consummated, -- (before there were complaints of sexual harassment), -- therefore there was no right to search.

Petitioners cite *Hopkins v. Andaya*, 858 F2d 881 (1992), again from the Ninth Circuit, which was complied with carefully by respondent against petitioners:

"Party moving for summary judgment has burden of proving absence of any genuine issue of material fact that would allow judgment as a matter of law."

A motion for summary judgment based on the directed verdict ending the first jury trial had been appropriately denied because of issues still in dispute, including whether sexual harassment was a justifiable excuse for search and seizure.

On this issue, moving party was fully heard as to the inception of the search but could not justify it or the scope of the seizure. Not all the witnesses listed with offers of proof, -- including Dr. Reynolds, who was said to have voluntarily complained of sexual harassment -- were called to testify.

Instead, Dr. Pranger, who was not even listed, was offered and listened to. What she remembers hearing, -- in weekly "no-holds-barred" group sessions with residents over the years, with the explicit expectation that nothing said will ever leave the meeting room, -- is short on specifics.

Dr. Pranger's hearsay testimony was incomplete at best because she wants to maintain confidentiality (which should have prevented her from even speaking in the first place). In fact, Dr. Pranger tried hard but was unclear as to dates and places and people she herself spoke to.

Dr. O'Connor heatedly argued outside of the second jury's hearing when reporting on his reaction to seized photograph that, as far as he was concerned, "undue influence" constituted sexual harassment of a subordinate, whether or not it was the subordinate that made the advances. And that it did not much matter that supervisor did not reciprocate. This brand new and inventive interpretation, unheard until spoken, is now offered

to support qualified immunity after the Supreme Court listed sexual harassment as an excuse for work-related searches. (But logical adherence to the O'Connor equation that inequality equals undue influence equals harassment makes this petition to a higher court quite harassing indeed!)

Judge Patel later appropriately directed a verdict in Ortega's favor on the single issue of sexual harassment as a reasonable excuse to start and extend the search and seizure. Both were inexcusable and unjustified.

First mention of court ruling about the ten-year-old Valentine card, standard book of love poems, and photograph was made when specific references to them moved plaintiff's lawyer to request the judge to instruct the jury about her ruling with regards to illegal search for and seizure of such personal papers. (Appendix accompanying petition contains many such issues that were subsequently resolved in favor of "party in real interest" by a jury of eight selected by both parties, after seized private correspondence were already ruled as having been illegally obtained.)

Petitioners allege that respondent judge did not follow the guidelines in *O'Connor v. Ortega* (above) rather than that she was unsound in judgment. Because respondent judge is an acknowledged authority on sexual harassment cases and has more expertise than petitioners or potential rescuers, an allegation of disobedience in the exercise of sound discretion is, on the face of it, frivolous but legally acceptsnlrle mugging.

Even if there was abuse of discretion, . . . petitioners have, in predicting a future chilling effect on kindred spirits, "failed to demonstrate . . . any hardship, let alone irreparable harm,

that had occurred or was likely to occur **immediately** (emphasis added), . . . there was therefore no reason to ignore . . . the clearly established mode of review for interlocutory orders of the type in question." . . . "Mandamus . . . may not be used to thwart the congressional policy of piecemeal appeals." In *re Estelle*, above.

The only case cited by petitioners in support of their plea for **immediate** intervention is clearly distinguishable from the present case: In *General Atomic Company v. Judge Felter*, 436 U.S. 493, "state court had **again** done precisely what federal Supreme Court had held there was no power of such state court to do."

DECLARATION

Under penalty of perjury, the undersigned declares that the statements in this brief are true of his own knowledge, understanding and belief (often in parenthesis). Little of above will be news to other "parties in interest".

CONCLUSION

For all of the foregoing reasons, observations, and legal decisions, this party in interest respectfully requests denial of this petition for extraordinary writ.

Directly submitted on May 20, 1996 in accord with Supreme Court Rule 27(b),

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